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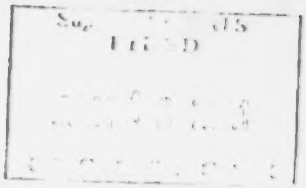

In the
Supreme Court of the United States

MOHAN THAMPI,

Petitioner,

v.

MANATEE COUNTY BOARD OF COMMISSIONERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

ROBERT MICHAEL ESCHENFELDER
Counsel of Record
DEPUTY COUNTY ATTORNEY
FLORIDA BAR NO.: 0008435
MANATEE COUNTY ATTORNEY'S OFFICE
1112 MANATEE AVENUE WEST, SUITE 969
P.O. BOX 1000
BRADENTON, FLORIDA 34206
PHONE: 941-745-3750
FAX: 941-749-3089
robert.eschenfelder@mymanatee.org

Counsel for Respondent

January 10, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

QUESTIONS PRESENTED

ISSUE 1. WAS THE TRIAL COURT REQUIRED TO ENTERTAIN THAMPI'S ARGUMENT THAT THE COUNTY RETALIATED AGAINST HIM FOR HAVING FILED THIS ACTION, WHERE SUCH CLAIM WAS NOT PLED IN THE ORIGINAL OR SUCCESSIVE AMENDED COMPLAINTS?

ISSUE 2. DID THE TRIAL AND APPEALS COURTS ERR IN HOLDING THAT THAMPI'S BEING LISTED BY A 3RD PARTY AS A POTENTIAL WITNESS ON THE 3RD PARTY'S INTERNAL DISCRIMINATION COMPLAINT FORM DID NOT CONSTITUTE SPEECH PROTECTED BY THE FIRST AMENDMENT AND/OR PROTECTED ACTIVITY COVERED BY TITLE VII'S RETALIATION PROHIBITION?

ISSUE 3. DOES ALLEGED IMPARTIALITY OF THE TRIAL COURT JUDGE REQUIRE A REVERSAL OF THE DECISION BELOW?

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Manatee County, a political subdivision of the State of Florida (Respondent)

Mohan Thampi (Petitioner)

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CONCISE STATEMENT ON JURISDICTION

Respondent adopts Petitioner's statement of this Court's jurisdiction in this Petition, as set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Respondent adopts Petitioner's statement of the provisions involved in this case, as set forth in Petitioner's Petition.

STATEMENT OF THE CASE AND MATERIAL FACTS

The Manatee County administration is run by a County Administrator, who reports to the elected Board of County Commissioners. Reporting to the Administrator are a series of department directors overseeing numerous departments which conduct County business.

The Project Management Department (PMD) was one such department. The general functions of the PMD were to oversee contract negotiations for and engineering design and construction of all capital improvement projects, as well as transportation, parks and utilities infrastructure projects including major maintenance. These projects were often valued in the millions to tens-of-millions of dollars. **Thampi 89, Hochuli 41.**[1] The PMD's department director was Tim Hochuli, P.E. Mr. Hochuli received his Masters in Civil Engineering in 1985, and has been a licensed Professional Engineer since 1989. He joined the County in 1997. **Hochuli 6-7.**

Plaintiff Mohan Thampi was employed by Manatee County on July 6, 2004. He was employed as the Projects & Engineering Manager reporting directly to director Hochuli. The position Thampi was hired into was, in fact, the position Hochuli held prior to being promoted to department director. During the interviewing process, numerous candidates were considered for the position, but Hochuli deemed Thampi as the most qualified candidate and selected him. Hochuli did so even though Thampi had informed him (**Thampi 67-68, 86-87**) that he was then

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[1] Rule 12(7) provides "a party may cite or quote from the record, even if it has not been transmitted to this Court." Based on this Rule, Respondent will cite to relevant record citations in this initial opposition Brief though the record is not before the Court. Obviously, if the Petition is granted, any citation made by Respondent will correspond to the record. Since name references may be helpful to identify which witness's testimony is being referenced, the County will reference same by the name of the affiant/deponent (all part of Doc. 59 of the record below), and the cited page number(s).

suing his former employer, Collier County, in federal court.[2]

According to the job description (Attachment 2 to Doc. 59: ***Exhibit 1, McDonald affidavit***), Thampi's position as Projects & Engineering Manager was a "high level management" position requiring the ability to provide "direction to staff during the planning, design, land acquisition and construction phases of public infrastructure projects to assure quality projects are produced in a timely and cost effective manner." The position contemplated performance of the work "with a high level of independence" and performance would be reviewed for results obtained, including "timeliness." The position description also indicates the incumbent was required to "maintain effective working relationships with others" and to "efficiently handle multiple projects at the same time in a timely and appropriate manner."

Thampi confirms he was in charge of the largest division within the PMD, overseeing 45 employees. He states, "most of the work which was happening came through me..." Thampi also participated in "over two hundred" interviews and he directly hired "at least 20" employees for the County, including at least one junior manager. **Thampi 30-32**. He was responsible for the

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[2] Thampi sued his former employer, Collier County, in 2004 for violation of the First Amendment based on his claimed criticism of that County. On March 5, 2007, the court entered summary judgment for the County in ***Thampi v. Collier County Bd. of Comm'rs*, 510 F.Supp.2d 838 (M.D.Fla. 2007)**; affd., **273 Fed. Appx. 836 (11th Cir. 2008)**; *rehearing and rehearing en banc denied*, **285 Fed. Appx. 741 (11th Cir. 2008)**; *cert. denied*, **129 S.Ct. 1040, 173 L.Ed.2d 469 (2009)**.

operational areas of projects management, plan review, survey, locates, records, and engineering design. As his employment began, Thampi confirmed that Hochuli had "full confidence in me" (**Thampi 22**), and allowed Thampi to oversee important matters such as contract and project negotiations on his own. **Thampi 22, 24**.

Also working within the Project Management Department was an administrative assistant named Deloris Crockett. Crockett had worked for various other County departments before moving to PMD, where she was the secretary for then PMD director Janet McAfee. **Crockett 21**. When McAfee resigned the position in 2004, Hochuli, who had held the position Thampi was ultimately hired into, was made interim and eventually permanent director. After working with Ms. Crockett for some time and not being satisfied with her performance, Hochuli decided to re-assign her to other support duties in the office and assigned another support staff worker, Marlene Marlatt, to be his assistant. Marlatt had been Hochuli's assistant prior to his promotion.

While Crockett, who is African American, lost no pay or seniority in the change (**Crockett 23**), she felt the change diminished her status. She also had a list of other items she didn't like, including her feeling that other ladies in the office wouldn't invite her to lunch, that Hochuli had once called her by her last name rather than her first, and that her work and conduct, such as personal visits or phone calls, were nit-picked more than other support staff in the office.

Section XIII of the Manatee County Commission's Personnel Policy bans workplace discrimination based

on the various federally-protected classes. The Policy (Attachment 3 to Doc. 59: ***Exhibit 13,*** *Garcia affidavit*) also provides for a procedure whereby any employee or applicant who feels he or she is being illegally discriminated against may complain and obtain an investigation by the County. The Policy provides that any complaint shall be made in writing to one of the managers in the County's Human Resources Department (HR). If an investigation is warranted, the County Administrator appoints one or more investigators to investigate. The policy specifies that all employees "are obligated to cooperate in a full and honest manner" with investigators. Once an investigation is completed, a report with findings and any recommended actions is provided to the County Administrator for consideration and adoption.

As was her right, Crockett filed a discrimination complaint on the official Manatee County Complaint of Illegal Harassment or Discrimination form (Attachment 3 to Doc. 59: ***Exhibit 14,*** *Garcia affidavit*) on January 19, 2007. The form, which requires various information to be included so as to help the complaining party and the investigators clarify the complaint and supporting information, asks the complaining party to identify witnesses who the party believes may have knowledge about the incident(s) described. Crockett listed four names, including Thampi. She did not list on the form what information she believed any of the witnesses would provide.

Pursuant to the Florida Public Records Act, all records of an agency related to an investigation of discrimination are confidential until the investigation is concluded. Therefore, internal discrimination

investigations by Manatee County's HR department are conducted in a confidential manner until the Administrator renders a decision adopting a final investigative report. **Garcia 9**. One of the first steps taken after HR is assigned to investigate a complaint is a notification memorandum sent to the department director notifying him or her, in general, that an investigation will occur. On February 2, 2007, Senior HR Manager Dale Garcia, who along with HR Analyst Garnet McDonald[3] had been appointed by the County Administrator to investigate the Crockett complaint, sent a Notification of Section XIII Investigation memorandum (Attachment 3 to Doc. 59: ***Exhibit 15***, *Garcia affidavit)* to director Hochuli. The memorandum provides no detail whatsoever as to who may have filed the complaint other than "an employee from your department." The memorandum reviews with the director the need to control rumors during the process, cooperate with the work of the investigators, and ensure no intimidation occurs. The memorandum also states:

> **What can I as Director Know?** Given the confidential nature of investigations under Section XIII, investigators will limit what information is released prior to the investigation being completed. Indeed, depending on the nature of the charges and identity of the accused, an investigator may elect not to share information even with a

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[3] Both investigators have significant experience investigating such complaints, and Garcia holds a Masters degree in Human Resources Management, and has received specific training on discrimination law and complaint investigation (**Garcia 39**).

> department director. Directors are asked not to take such lack of sharing personally as it is being done only to ensure the investigation's integrity. Be assured that the investigators will keep the director as informed as possible about the course and scope of the investigation as it proceeds.

And

> **Confidentiality** Florida law and County policy both state that investigations into illegal harassment or discrimination are confidential and the records exempt from disclosure prior to a final report being adopted. Therefore, department directors, managers or others are asked not to request copies of witness statements or other evidence. During the interview process, witnesses are informed that their statements are confidential until the investigation is complete and that they are not to discuss their testimony with anyone after the interview is over. It is up to the department director to help the County reinforce this right by refraining from, and instructing all subordinate staff to refrain from, asking persons who have been interviewed about what happened during the interview...

The only other person copied on this memorandum is the County Administrator. After this "launch memo" is sent, and the investigators map out the course of their investigation, record reviews and interviews are conducted. In the Crockett matter, by the time the investigators sought to schedule Thampi to be interviewed, he had already been terminated.

Nevertheless, the investigators did obtain an interview with Thampi on March 1, 2007, wherein they conducted a recorded interview with him. Pursuant to standard County practice, his interview was reduced to writing and he was able to review, correct and sign it. Thampi's statement in the Crockett matter (Attachment 3 to Doc. 59: ***Exhibit 16,*** *Garcia affidavit*) basically supported Crockett's assertion that she was doing her job. Thampi intimated that Crockett was assigned different duties so that Marlatt, who had a friendship with Hochuli, could continue to be his secretary. When asked if he felt the things Crockett complained of had occurred to her because of her race, he opined, "yes, now that you ask me." When asked why he felt so, he only offered his view that 'she is African-American, she was doing her job, and so what else could it be?'

On June 5, 2007, the investigators issued their recommended final report on Crockett's complaint to the County Administrator. The 28 page report reviewed in detail each issue raised by Crockett. It concluded that while there was no evidence of race discrimination, either as to Hochuli's change of duties between Crockett and Marlatt or the various other office/co-worker interaction issues, Hochuli should have given Crockett more time and specific feedback on her performance issues before changing her title and duties. On July 13, 2007, the County Administrator adopted the report and recommendations. (Attachment 3 to Doc. 59: ***Exhibit 17,*** *report and Administrator's adoption letter, Garcia affidavit*).

Within a year of being hired, Thampi began to need detailed guidance from Hochuli. In his July 2005

performance evaluation, Hochuli wrote, in relevant part:

> Mohan's responsibility has been to decrease the actual time taken for development reviews. However, despite providing additional resources for development review, the review time period has not decreased significantly. *** This needs to be a priority over the upcoming period. *** Also, a contractor completion tracking tool has been developed and this needs to be updated on a regular basis, probably weekly...Mohan needs to perform this updating and follow-up of the status of the necessary paperwork associated with construction completion dates.

(Attachment 2 to Doc. 59: ***Exhibit 2, McDonald affidavit***). Additionally, in the fall of 2005, Hochuli also discovered for the first time that Thampi had been less than candid when reviewing his job history when he applied to the County. On September 8, 2005, Collier County deposed Hochuli (Doc. 59, attachment 5) related to Thampi's suit against it. Hochuli learned during this deposition that Thampi had been dismissed and/or asked to resign from several prior positions which he had not correctly represented in his Manatee County application. In spite of obtaining information which could have led to the dismissal of Thampi, Hochuli decided to allow him to remain employed.

On December 22, 2005, Thampi was issued an Employee Warning/ Counseling form (Attachment 2 to Doc. 59: ***Exhibit 3, McDonald affidavit***). The form noted that Thampi continued to use his County computer to access internet sites for personal purposes

not needed for the performance of his duties (a matter the form notes had been discussed with him "on at least two prior occasions"). Hochuli also admonished Thampi in the form that he was "arriving late to work on most mornings," which Hochuli noted "set a bad example" for Thampi's subordinates.

On February 21, 2006, Thampi received a Notice of Disciplinary Action for failing to comply with the County's computer and internet use policies, insubordination by refusal to comply with instructions and conducting personal business during duty hours (Attachment 2 to Doc. 59: ***Exhibit 4, McDonald affidavit***). The basis of this notice was that the County's computer security staff had provided Hochuli with internet use history which showed Thampi again using his internet for "personal banking" and "personal shopping" on multiple sites. Hochuli noted again that he had verbally counseled Thampi on this matter previously, and had issued a warning notice again specifically instructing Thampi to refrain from this behavior. Hochuli found the continuing personal use had become insubordinate, and he commented in his notice that while the sites Thampi were visiting were not illegal or illicit, "as a high-level manager, Mohan must be expected to follow County rules, set a proper example for his and other employees and follow the instructions of supervisors without continuous follow-up. I must be able to trust that my instructions will be followed by the high-level managers reporting to me..." While this was a formal discipline notice, Thampi did not receive any unpaid suspension period.

In his July 2006 evaluation of Thampi (Attachment 2 to Doc. 59: ***Exhibit 5, McDonald affidavit***), director Hochuli found that while Thampi was performing to

the minimal standards of his position generally, he failed to meet expectations in the managerial evaluation category of development of assigned staff. In his written comments, Hochuli noted:

> Mohan needs to show initiative and leadership in working with the various PMs [Project Managers who were Thampi's subordinates]. While it has been important to concentrate his efforts in the plan review section, more time needs to be spent providing input and assistance on capital projects. He also needs to ensure that timely responses...are provided to County and outside staff. At times, Mohan over-delegates his workload and needs to directly address the issue in question. Even at the division manager level, we need to take on work beyond that of strictly a supervisory nature. Mohan needs to establish deadlines for his staff for all development review projects and track and discuss those deadlines with staff. This has not taken place during the period, as requested in the last [evaluation].

About a month later, on August 23, 2006, Hochuli issued Thampi another Warning/Counseling form. In the lengthy discussion of specific performance issues (Attachment 2 to Doc. 59: ***Exhibit 6***, *McDonald affidavit*), Hochuli notes Thampi's failure to provide specific and accurate comments on projects, and to follow up, and ensure subordinate project managers follow up, on projects nearing completion. He lists numerous projects and the issues related to them as examples, and concludes:

> All of these issues have either been discussed verbally with Mohan or indicated on previous mark-ups of these spreadsheets that have been given to Mohan. Addressing these issues is Mohan's responsibility as indicated in his Position Description and as discussed verbally with him on numerous occasions. Addressing these matters needs to take place immediately.

On August 23, 2006, Thampi received another Notice of Disciplinary Action (Attachment 2 to Doc. 59: ***Exhibit 7, McDonald affidavit***) for insubordination. In it, director Hochuli states:

> As part of his last two annual [evaluations], comments on Mohan's performance included asking him to establish deadlines for his staff for all development review projects and track and discuss those deadlines with staff. This has not taken place despite being included in these [evaluations] and other verbal discussions... *** In addition...I followed up on the subject with Mohan in early August, 2006, via e mail asking "what is the timetable for implementation and the method of tracking that you will use for the review deadlines in the planning group?" I have not been provided with a response.

Inasmuch as the situation was still not improving, and since Thampi's frequent response to Hochuli would be to assert a lack of detailed direction on *exactly* what to do, and *exactly* which staff should do what, Hochuli issued a memorandum (Attachment 2 to Doc. 59: ***Exhibit 8, McDonald affidavit***) to several staffers, including Thampi, on December 5, 2006. The

memorandum (which effectively is the tracking plan detail Hochuli was looking for Thampi to develop) breaks down, in detail, who will do what, and gives Thampi overall "responsibility for tracking all project deadlines and following up with the project managers, as needed, on each deadline." In addition to the evaluations and discipline notices reviewed above, Hochuli also communicated regularly to Thampi by e mail concerning his performance deficiencies. The composite ***Exhibit 19*** of the *Underwood affidavit* (Attachment 4 to Doc. 59) demonstrates, beginning in December of 2005 through October of 2006, various e mail messages where Hochuli raises these issues with Thampi, and/or where others note deficiencies or communications issues with him.

By late January 2007, Hochuli determined that he had tried long enough to obtain the type of performance he needed from Thampi, one of his senior division managers. Therefore, on January 30, 2007, he issued Thampi a written pre-termination letter (Attachment 2 to Doc. 59: ***Exhibit 9***, *McDonald affidavit*), informing him he was being considered for termination due to incompetence and inefficiency, insubordination, conducting personal business during duty hours, and productivity and workmanship not up to required standards of performance. In the letter, Hochuli reviews the history of his efforts to get Thampi to track, monitor, and follow up on projects. However, he notes that while Thampi produced a spreadsheet of projects in late December, he:

> did not include dozens of projects which should have been included. A comparison of the calendar submitted to our active project list resulted in the finding that many projects that

> could have easily been included were not included. This once again illustrates that either you are not familiar with our capital projects after having 2 ½ years to get familiar with them or you simply could not provide a satisfactory work product on this assignment. Either of these situations is not acceptable in the operation of this department.

The pre-termination letter also reviews the history of Hochuli's still-unsuccessful efforts to get Thampi to review all consultant work and provide the detailed comments needed which could only come from an engineer (which Thampi was) and not non-engineer project managers. The letter also cites Thampi's lack of responsiveness, both to County staff and outside parties doing business with the department. Finally, it notes that County computer records confirmed Thampi was still using County internet access for non-business reasons.

Hochuli met with Thampi on these matters on the same day as he issued the pre-termination letter. It is standard practice in the County to place an employee on administrative leave once a pre-termination letter is issued (**Garcia 42**), and per this practice, Thampi was sent home after his meeting to await Hochuli's final decision. Thampi sought time to develop a written response to the letter, which Hochuli granted. Thereafter, on February 2, 2007, Thampi submitted an eight page rebuttal (Attachment 2 to Doc. 59: ***Exhibit 10, McDonald affidavit***) with exhibits attached. The rebuttal indicated Thampi took no blame whatsoever for any issues raised by Hochuli. It does reveal that at the time of his termination, Thampi believed he was being terminated not in retaliation for having been

listed in Crockett's internal complaint as a possible witness, but instead, as outlined in the second to last paragraph of the submission: "the primary motive to try to terminate me has been that you had long promised [PMD employee] Tod Phinney the position as Projects and Engineering Division Manager." After considering Thampi's submission, Hochuli made his final decision to terminate Thampi, which he did by issuing a termination notice (Attachment 2 to Doc. 59: ***Exhibit 11, McDonald affidavit***) on February 12, 2007. The notice cited the same personnel rules as were noted in the pre-termination letter as the rules violated. The notice provides a little over three single-spaced pages of detailed discussion concerning Thampi's performance issues and history of failing to comply with instructions from Hochuli, and concludes:

> It is greatly dismaying to me, and somewhat ironic, that you are now offering various theories of why I want to get rid of you, when I was the person who hired you over other candidates in the first place. Indeed, I have given you credit where it was due, such as always admitting your great professional knowledge in your chosen field. However, you can have all the knowledge in the world but it will not be adequate if not joined by a positive attitude, sufficient communication skills, and a strong work ethic. Since I have tried repeatedly over time, as reviewed herein, to work with you to improve your performance, and since that has failed to work, I have no choice but to terminate you. Managers are held to a higher standard than lower ranking employees and I simply can't spend any more of my time trying to work

with you. I wish you the best of luck in your future endeavors.

Manatee County has a detailed written policy providing for a post-termination appeal process for employees who are not classified as serving at the will of the Administrator or County Attorney. Pursuant to this policy, Appellant Thampi submitted a request for a post-termination hearing before a Hearing Officer. A two day hearing was scheduled and heard for Thampi on May 10 & 11, 2007.

During Thampi's hearing, at which he was represented by legal counsel who also represents him in this litigation, Mr. Thampi was entitled to, and did, call witnesses, introduce evidence, cross-examine the County's witnesses, and make arguments to the Hearing Officer. The Hearing Officer took the matter under advisement and rendered his eight page recommended order upholding the termination to the County Administrator on July 18, 2007. The County Administrator adopted the order as his own on July 20, 2007. (Attachment 2 to Doc. 59: ***Exhibit 12***, *copy of order and adoption letter, McDonald affidavit*) Under the County's policies, this was the final quasi-judicial act on the part of the County. It is undisputed that thereafter, Thampi filed a timely charge of ethnic discrimination and retaliation with the EEOC, and received a dismissal and right to sue, resulting in the lawsuit below, but not alleging ethnicity discrimination.

Hochuli was and is a Major in the Army Reserves. **Hochuli 8-9**. Hochuli was issued orders related to the Iraq War, and on May 29, 2007, he ceased reporting to work and instead reported for duty, first to a U.S.

base, then on to Iraq. Hochuli's Army duties ended in August of 2008, and after a rest period he re-joined the County's employ. **Hochuli 36**.

However, by the time he returned, the new County Administrator had made the decision to overhaul his administration, and several departments were eliminated, while others were created. According to Crockett: "The County was doing a reorganization that affected every department." **Crockett 23**. As a part of this effort, the PMD no longer existed and its functions had been assigned to other departments, with the majority being transferred to the Public Works department. Hochuli now serves as one of several deputy directors in that new department. **Hochuli 37**. As a result of this same re-organization, Crockett transferred to the Property Management Department, where she thereafter worked as Administrative Support Coordinator. **Crockett 23**.

While still working for the County, Thampi applied for a position with Sarasota County government. Since Hochuli was serving in Iraq soon after Thampi's post-termination hearing, he was never in a position to, nor did he ever, personally give any job references for Thampi to any employer. **Hochuli 32**. Thampi listed several other County staff as references, including Utilities Department director Dan Gray and Utility Manager John Zimmerman. Thampi confirmed that it was these two persons who he alleges gave "false" information to Sarasota County. **Thampi 72-74**. The paperwork he deemed "false and defamatory" was his termination paperwork, and the decision of the Hearing Officer in his termination appeal. **Thampi 75**. "Its my file. It was...false..." **Thampi 111**.

As to the reference call, Gray testified that Mr. Jody Kirkman, Sarasota County's Utilities Planning and Regulatory Manager (**Kirkman 5**) called him sometime in September of 2007, indicating that Thampi had listed him as a reference (**Gray 5**). Gray indicated his surprise, since Thampi had never worked for Gray. Gray declined to give any specific recommendation one way or the other (**Gray 6-7**), and suggested Hochuli would be the best source of information on performance. Likewise, Zimmerman told Kirkman he "didn't really have a lot of close interaction with Mohan [and] didn't assign Mohan tasks and track how he performed on them. And I really felt that I wasn't in a position to make a recommendation on performance." **Zimmerman 11**.

While Kirkman's recollection of his calls to Gray and Zimmerman included some discussion not recalled by Gray or Zimmerman, such as that they would not recommend re-hiring Thampi and that they thought he had performance issues, both Manatee officials confirmed that at the time of the reference call, they had no knowledge that Thampi had filed a lawsuit (**Gray 22**), (**Zimmerman 35**). According to Kirkman, the official from Sarasota: "Both basically told me they did not supervise Mr. Thampi" (**Kirkman 15**), "They were very clear that they did not supervise Mr. Thampi" (**Kirkman 43**), and "they did not" mention anything about a Thampi lawsuit (**Kirkman 48**). In fact, as of the date of his deposition in this case, Kirkman had still not ever even seen a copy of Thampi's suit, or what it alleged (**Kirkman 48-49**).

On September 14, 2007, and presumably as part of its reference check process, a representative of the Sarasota County personnel office sent an e mail to

Manatee County's Human Resources director Garry Dye, asking for copies of Thampi's personnel records (Attachment 4 to Doc. 59: **Exhibit 21**, *affidavit of Underwood*). Based on Sarasota County's request, Manatee County's Human Resources Department copied Thampi's file, which was personally picked up by Mr. Kirkman, the official in Sarasota's utilities department who was going to decide whether to complete the hiring process (**Kirkman 13**). On the day Kirkman picked up the file copy, he confirms he had no verbal interactions with anyone in Manatee County's HR office: "From what I recall, I just went to the front desk and they handed me the package...and I left." (**Kirkman 45-46**). Kirkman confirms that by this time, he had already interviewed Thampi, that the interview "went well" and that he had already made a conditional offer of employment to Thampi, subject to reference checks (**Kirkman 8-10**). Kirkman confirms that Sarasota County's HR department requested public records of Thampi's personnel file from Manatee and Collier Counties (**Kirkman 11, 26**), and that once he reviewed the records he obtained, he decided not to proceed with the hiring of Thampi:

> I needed an individual that could perform. I was really concerned after I started getting into both reference checks and just looking at the information we got from Collier and Manatee. I felt this incumbent may have not performed in the manner we needed in that position.

Kirkman 11-12. He confirms that he based his decision to withdraw the conditional offer not only on the negative performance information in the Manatee file, but also on the negative information in the Collier files (**Kirkman 50**).

ARGUMENT AND AUTHORITIES

ISSUE 1. WAS THE LOWER COURT REQUIRED TO ENTERTAIN THAMPI'S ARGUMENT THAT THE COUNTY RETALIATED AGAINST HIM FOR HAVING FILED THIS ACTION, WHERE SUCH CLAIM WAS NOT PLED IN THE ORIGINAL OR SUCCESSIVE AMENDED COMPLAINTS?

Thampi filed his original *Complaint* against the County on August 15, 2007. Doc. 1. It was a one count complaint invoking 42 U.S.C. § 1983, alleging the County did not provide Thampi procedural due process related to his termination proceedings. Thampi filed his first *Amended Complaint* on September 24, 2007. Doc. 9. It contains two counts, the original procedural due process claim, joined by a new substantive due process claim.

On April 29, 2008, the lower court granted Thampi's motion to file a *Second Amended Complaint*, and deemed it filed on that date. Doc 33. In it, Thampi maintains a procedural due process claim, drops the substantive due process claim, and for the first time adds a count asserting First Amendment retaliation. Each count invokes 42 U.S.C. § 1983. In this *Second Amended Complaint*, Thampi alleges, at ¶ 56, that the County provided false or defamatory information to a potential employer "in further retaliation for Plaintiff having exercised his First Amendment rights for being a witness" [in the internal County investigation]. He further confirms in ¶ 57 that he felt his "stepping forward as a witness" was the First Amendment "speech" over which the County allegedly retaliated against him by terminating him.

On July 21, 2008, Thampi files his *Third Amended Complaint*. Doc. 39. In it, he retains his due process and First Amendment claims, and adds a count invoking the anti-retaliation provision of Title VII. As in his prior Complaint, Thampi again alleges, at ¶ 56, that the County provided false or defamatory information to a potential employer "in further retaliation for Plaintiff having exercised his First Amendment rights for being a witness" [in the internal County investigation]. And again notes, in ¶ 57, that he felt his "stepping forward as a witness" was the First Amendment "speech" which was the cause of the County's alleged retaliation against him. In addressing his Title VII retaliation claim, Thampi re-alleges the paragraphs of the Complaint supporting the First Amendment retaliation count, including ¶ 56 and ¶ 57 (concerning his status as a listed witness in the internal complaint of the co-worker). While he does not directly allege the "Title VII protected activity" supporting his Title VII retaliation count, Thampi does allude, at ¶ 59, to his "participation as a witness" for his co-worker as the protected activity at issue. Nowhere in any of the Complaints does Thampi allege the filing of his lawsuit in this case resulted in retaliation (either in First Amendment or Title VII guise), nor even make passing mention of filing a lawsuit as his protected activity.

In its discussion with Thampi's counsel on the issue of whether he had sufficiently pled a cause of action for retaliation based on the filing of his lawsuit, the trial court no doubt was referring to the Supreme Court's decision in ***Ashcroft v. Iqbal*, ---U.S.---, 129 S.Ct. 1937, 173 L.Ed. 868 (2009)**, adopting a more stringent standard for civil rights pleadings to satisfy the requirements of Rule 8. However, as shown by the

earlier review of Thampi's various Complaints, that discussion was somewhat academic, because at least as to Title VII retaliation, the County could not, as a matter of law, have retaliated against him in September of 2007 (by giving the alleged "false and defamatory" reference information to a potential employer) in retaliation for exercising the right to file a Title VII lawsuit (clearly a protected activity) in August of 2007. That is because, in August of 2007, Thampi had not sued the County *for a violation of Title VII*. He had only sued the County for a violation of due process, invoking 42 U.S.C. § 1983. The first Complaint to mention a Title VII violation was Thampi's *Third Amended Complaint*, filed July 21, 2008, 10 months *after* the County gave Thampi's personnel file to Sarasota County per its request. An employer cannot retaliate against an employee for a Title VII protected activity the employee has not yet engaged in. Thus, even if the trial court had agreed, based on nothing more than oral argument at the summary judgment hearing, to consider the 2007 reference as an alleged act of retaliation for having exercised the right to file a Title VII lawsuit, there would still not have been a legal basis to deny the County's summary judgment motion. That is so since the alleged adverse action (the allegedly defamatory information given to the potential new employer) occurred well *before* the filing of a Title VII lawsuit.

Even setting aside these arguments, Thampi's pleadings never raised this new, distinct, different-in-time allegation of Title VII retaliation to the EEOC, as required. He also never argued the point in his own *Motion for Summary Judgment*, and never filed a motion to file a fourth amended complaint seeking to

add this issue. For these reasons also, Thampi's Petition on this point should be denied.

Issue 2. DID THE TRIAL AND APPELLATE COURTS ERR IN HOLDING THAT THAMPI'S BEING LISTED BY A 3RD PARTY AS A POTENTIAL WITNESS ON THE 3RD PARTY'S INTERNAL DISCRIMINATION COMPLAINT FORM DID NOT CONSTITUTE SPEECH PROTECTED BY THE FIRST AMENDMENT AND/OR PROTECTED ACTIVITY COVERED BY TITLE VII'S RETALIATION PROHIBITION?

The second issue raised by Thampi essentially asks the Court to rule that a third party public employee co-worker's independent act of listing the employee as a potential witness on an internal discrimination complaint form, with no accompanying verbal or physical act on the part of, or foreknowledge by, the employee, results in speech protected by the First Amendment, and/or protected activity under Title VII's anti-retaliation provision. Such a ruling would expand the concept of speech and protected activity to absurd levels. The following argument as to each legal theory will demonstrate not only that Thampi's position is legally unsupported, but also that the lower courts rested their decisions as to the two counts at issue on several grounds, and that since those alternative grounds were not challenged on appeal, granting the Petition would only result in an advisory opinion.

First Amendment Retaliation

As to his First Amendment claim, Thampi states that at the time he was terminated, he was "at the very least...a potential witness" in the County's internal investigation of a discrimination complaint of

another County employee (¶ 52), that "merely being a potential witness in proceedings addressing discrimination claims can give rise to First Amendment retaliation claims" (¶ 51), and that "identification or participation as a witness in such a proceeding is a matter of public concern" (¶ 53). To establish retaliation in the public employment context, a plaintiff must first prove he or she spoke on a matter of public concern. ***Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)**. A "public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." ***Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986)**. Whether the employee spoke on a matter of public concern is a question of law for the court. ***Morris v. Crow*, 117 F.3d 449, 455 (11th Cir. 1997)**. Respondent contends Thampi never "spoke" for First Amendment retaliation purposes, and that even if someone else listing you as a witness on an internal complaint form were "speech" on the part of the person being listed, such "speech" was not on a matter of "public concern." While First Amendment jurisprudence expands the original focus of the amendment to cover "exotic" dancers and flag-burners, bestowing constitutional protection to someone who said nothing, and did nothing, and in fact didn't even wish to say or do anything, would be too significant a departure from the amendment's intent. Thampi doesn't cite to even one case supporting his position, and this Court should hold that his being listed on the complaint form simply wasn't speech on his part.

Even assuming, *arguendo*, that this listing was First Amendment speech, it nevertheless was not on a matter of public concern. To determine whether

speech is on a matter of public concern, a court will consider "the content, form and context of a given statement, as revealed by the whole record." As the Eleventh Circuit's opinion in this case pointed out, since there were no words or deeds, there is no "content, form or context" to examine.

As to whether Thampi sought to present his "speech" to the general public, he clearly did not: "Delores had come to me when she was getting harassed and stressed and asked me...you know, my advice; and I told her, try to work it out with Tim [Hochuli]." **Thampi 56-57**. However, Crockett decided to file an internal complaint instead. When she informed Thampi that she had done so and already listed him as a witness, Thampi reacted thus: "I was sitting there and saying, Delores, leave—try to leave me out of this because—self-preservation..." **Thampi 57**. While the record confirms Thampi eventually agreed to an interview request from HR (after he'd already been terminated), clearly, at the time Crockett filed her complaint, Thampi had no desire to voice anything to HR, let alone to the public at large. Being listed by someone else as a potential witness isn't speech "on a matter of public concern" and even if Thampi had given his statement to the investigators before the alleged retaliatory termination (which he didn't), compliance with an internal investigative process which employees are required to cooperate with simply does not have the content, form or context needed for protected First Amendment expression. Rather, it fits within the type of speech related to an employee's duties (in this case to cooperate in an internal investigation). See, ***Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993)**(complaints of sexual harassment

made only to official bodies where concerns not related to the public were not of public concern).

Even if one assumes, *arguendo*, that Hochuli: 1) knew Thampi had been listed as a witness on the complaint form, 2) drew some conclusion that Thampi would state something to a public audience (not HR) which may satisfy the "matter of public concern" test, and 3) terminated him based on this mistaken belief, this *still* does not create a First Amendment violation because, as of the date Hochuli made his termination decision, Thampi had not in fact given any statement to anyone. As one case has noted, "The First Amendment affords no protection to speech that the employee did not actually utter." ***Blickley v. Ford*, 2009 WL 856638 (M.D. Fla. March 30, 2009)**(holding that as a matter of law, to the extent the plaintiff was fired because of a mistaken belief as to what speech she *may have* engaged in, she had no constitutional claim).

Title VII Retaliation

As to his Title VII retaliation count, Thampi alleges in his *Third Amended Complaint* that the investigation in which he was a witness was "pursuant to an investigation in compliance with Title VII" (¶ 59), and that his being a witness in the investigation constitutes opposition to discrimination and/or participation in a Title VII proceeding (¶ 60). Thampi alleges in his Petition that the County's termination of him, and alleged provision of false information to Sarasota County related to his job application, constitute Title VII retaliation.

To establish a prima facie case of Title VII retaliation, a plaintiff must show that he: 1) engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding, 2) suffered an adverse employment action simultaneously with or subsequent to such opposition or participation, and 3) a causal connection exists between the protected activity and the adverse employment action. While Thampi's February 12, 2007, termination was an adverse action, he had not as of that date engaged in protected activity, and thus could not establish the required connection. Thampi is not covered by the "opposition clause" because: 1) the mere fact that Thampi was listed by Crockett as a witness does not translate into opposition by Thampi, and 2) even assuming, *arguendo*, that it did, Thampi's belief that Crockett was being racially discriminated against was not objectively reasonable.

In ***Crawford v. Metro. Govt. of Nashville, et al.*, --- U.S. ---, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009)**, the Court decided the opposition clause extends to an employee who speaks about discrimination not of his or her own initiative, but by answering questions during an employer's internal investigation. In ***Crawford***, the HR investigator asked her whether she had witnessed sexually harassing conduct by a supervisor, which she confirmed in detail. This Court concluded that by doing so, she was "opposing" a Title VII violation.

In contrast, Thampi not only made no overt attempt to oppose what he may have felt was discrimination against Ms. Crockett (he confirms he "never brought anything up" to Hochuli, and did not approach the County Administrator with any concerns

(**Thampi 123-24**)), he didn't even provide a statement at the request of HR investigators until March 2007, when he was no longer employed by the County. **Thampi 124**.

In the concurring opinion in ***Crawford***, it was noted that the decision did not convert "silent opposition" into a protected Title VII act, but rather still required testifying concerning discrimination, even if such testimony came at the behest of investigators rather than on the employee's own initiative, and that: "The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case." ***Crawford*, 129 S.Ct. at 854-55**. Since Thampi engaged in no "purposive conduct" while employed with the County, he cannot be found to have "opposed" anything.

Thampi's Petition asserts the Eleventh Circuit's opinion creates a post-***Crawford*** "circuit split" on this issue, citing ***Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009)** and ***Collazo v. Bristol-Myers Squibb*, 617 F.3d 39 (1st Cir. 2010)**. However, no split is present. In ***Thompson*** (currently under review in this Court), the Sixth Circuit ruled that an employee terminated after his fiancée filed an EEOC charge, but who himself did nothing regarding the charge, was not protected under Title VII's anti-retaliation provision. This case concerns the focused question of whether Title VII covers "friends or family members retaliation", and its facts are clearly distinguished from those in this case.

In ***Collazo***, the court ruled that a supervisory employee who assisted another employee in asserting an internal harassment claim was protected when he was subsequently fired. However, in that case, Mr. Collazo spoke to the alleged harasser directly, arranged a meeting for the victim with the company's HR staff and attended the meeting, sent a follow up e mail to HR confirming his view that this was a serious issue, and two days later, went again with the victim to HR to press the charges to HR. Respondent believes this post-***Crawford*** case was correctly decided. Clearly Mr. Collazo took many open overt steps (purposive action) to help the victim press her charge. But unlike that case, Thampi stated his distress at having had his name listed as a witness, and confirmed he did not speak to anyone about the matter until well after he had been terminated.

Petition Can Only Result in an Advisory Opinion

An appeals court will generally affirm the decision below if it is sustainable on any legal ground or theory apparent on the record. The reviewing court is concerned with the correctness of the action of the trial court, without regard to the reasons motivating the lower court. ***Burget v. Union Pacific R. Co.*, 240 F.2d 207 (8th Cir. 1957)**. A federal appeals court may this affirm on any grounds supported by the record below, even though such differs from that which was assigned by the trial court. ***Hutchison v. Pfeil*, 208 F.3d 1180 (10th Cir. 2000)**. See generally 36 C.J.S. Federal Courts § 586. Similarly, where a ruling on one aspect of a lower court's justification could not affect the judgment because there was an independent sufficient basis for that judgment, the Supreme Court

has refrained from exercising jurisdiction since any ruling would amount to a mere advisory opinion. ***Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).**

In addition to finding no protected activity, the lower courts also found that Thampi could not demonstrate the required causal connection. Thampi did not appeal this issue either to the Eleventh Circuit or in this *Petition*. Thampi is unable to establish a causal connection between his statement to the HR investigators and his termination since the former was given well *after* the latter, and you cannot retaliate against someone for something which has not yet occurred. See, for instance, ***Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 529-30 (6th Cir. 2008).**

While Thampi would postulate that Hochuli must have known at least that he had been listed as a witness for someone else's complaint since someone in HR must have told him, the trial court was correct to conclude this was not supported by the record Thampi helped develop. Thampi adduced no record evidence to support this theory and, as the trial court found, the record showed the contrary, that Hochuli never saw the complaint form, nor knew of Thampi's having been listed as one of several possible witnesses. This "*must have known*" line of reasoning is also rejected in the Eleventh Circuit. See, ***Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 791-92 (11th Cir. 1992); *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999); *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 799 (11th Cir. 2000); and *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1156 (11th Cir. 2002).**

The trial court also found that even if Thampi had stated a prima facie case, he could not overcome the County's stated legitimate, non-discriminatory reasons for his termination. Since these alternative holdings were not appealed to the Eleventh Circuit, and are not part of the *Petition* before this Court, the *Petition* must be denied as it could only result in an advisory opinion.

ISSUE 3. DOES ALLEGED IMPARTIALITY OF THE LOWER TRIBUNAL REQUIRE A REVERSAL OF THE DECISION BELOW?

The final issue raised by Thampi concerns his belief that the trial judge should have recused himself due to prejudice/hostility against his counsel. Respondent believes the Eleventh Circuit's disposition of this matter was wholly correct, and no further argument is needed to support denying this part of the Petition.

CONCLUSION

Respondent Manatee County respectfully requests the Petition be denied.

Respectfully submitted,

ROBERT MICHAEL ESCHENFELDER
Counsel of Record
Deputy County Attorney
Florida Bar No.: 0008435
Manatee County Attorney's Office
1112 Manatee Avenue West, Suite 969
P.O. Box 1000
Bradenton, Florida 34206
Phone: 941-745-3750
Fax: 941-749-3089
robert.eschenfelder@mymanatee.org
Counsel for Respondent